MyTeksi Sdn Bhd & Ors v Competition Commission

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-162–03 OF 2020
HANIPAH FARIKULLAH, HADHARIAH SYED ISMAIL AND HASHIM HAMZAH JJCA
1 OCTOBER 2022

Competition Law — Competition Act 2010 — Whether 'proposed decision' issued by Competition Commission under s 36(1) of Competition Act 2010 ('CA') was amenable to judicial review — Whether party affected by 'proposed decision' under s 36(1) had no right to appeal the decision to Competition Appeal Tribunal under CA — Whether such party had no choice but to apply for judicial review — Whether certiorari would lie to quash a 'proposed decision' under s 36(1) in an appropriate case

The High Court had refused to grant the appellants leave to apply for judicial review to quash a 'proposed decision' by the respondent to fine the appellants for infringing a prohibition under Part II of the Competition Act 2010 ('the CA'). The court's reasons for refusing leave were that: (a) the proposed decision was not amenable to judicial review as it was not a final decision that disposed of the rights of the parties; and (b) the appellants had failed to exhaust the alternative remedy of appealing to the Competition Appeal Tribunal ('CAT') under the CA before applying for judicial review. In the instant appeal against the High Court's decision, the appellants argued that even though the proposed decision was not a final decision under s 40 of the CA, it required them to comply immediately with the decision or risk being subjected to further financial penalties. The appellants said that since the proposed decision adversely affected their rights, they should have been allowed to challenge the same by way of judicial review. The appellants said they had no alternative but to seek judicial review as the proposed decision was not appealable to CAT under the provisions of the CA.

Held, unanimously allowing the appeal, granting the appellants leave and remitting the matter back to the High Court to hear substantive arguments:

(1) The content of the proposed decision showed that the respondent was effectively making a decision in principle on the infringement. The plain effect of the proposed decision itself was indeed a decision in principle. In fact, in its proposed decision, the respondent, inter alia, imposed a daily penalty of RM15,000 from the date of service of the proposed decision in the event the appellants failed to comply with the respondent's directions. The nature of the respondent's determination under s 36 of the CA

demonstrated that it was an important step on the path to a decision-making under s 40 of the CA. Although a final decision under s 40 of the CA was not made, it did not follow that the appellants were precluded from mounting a challenge at this earlier stage. There was no automatic bar to challenge at this stage (see paras 39 & 41–42).

(2) Certiorari was available to quash the legal effect or the legal consequences of a decision under review. The content of the proposed decision appeared to have legal consequences and was a step in a process capable of affecting the rights, interest or liabilities of the appellants (see paras 43–44 & 46).

(3) The CA did not provide for appeals against decisions made under s 36(1). Hence, the Competition Appeal Tribunal under the CA did not have jurisdiction to deal with complaints concerning the issuance of a Proposed Decision under s 36(1). The right to appeal under the CA was only concerned with decisions made under ss 35, 39 and 40 of the CA. The High Court was therefore wrong to have refused leave to the appellants on the basis that they had a suitable alternative remedy of appeal against the proposed decision which they had not exhausted (see paras 55–57).

(4) There were questions of law and of statutory construction that required further consideration at the substantive stage. It was not for the Court at the leave stage to determine those issues. This Court decided to grant the appellants leave because the issue as to whether the proposed decision was a 'decision' within the meaning of O 53 r 2(4) of the ROC 2012 was an arguable one (see paras 58 & 61).

(5) On the facts and circumstances of this case, the High Court judge had the power to direct for the leave application, which was usually made ex parte in the first instance, to be heard inter partes. So long as the judge had demonstrated proper exercise of discretion under O 53 r 8(1) of the Rules of Court 2012, based on the facts and circumstances prevailing and the established judicial principles, this court would be slow in embarking on an appellate interference (see paras 27–28).

[Bahasa Malaysia summary

Mahkamah Tinggi telah menolak dalam memberikan kebenaran kepada perayu untuk memohon semakan kehakiman bagi membatalkan 'keputusan yang dicadangkan' oleh responden untuk mendenda perayu kerana melanggar larangan di bawah Bahagian II Akta Persaingan 2010 ('AP'). Alasan mahkamah dalam menolak kebenaran adalah: (a) keputusan yang dicadangkan tidak boleh dipinda melalui semakan kehakiman kerana ia bukanlah keputusan muktamad yang melupuskan hak pihak-pihak; dan (b) perayu telah gagal untuk menggunakan remedi alternatif untuk merayu kepada Tribunal Rayuan Persaingan ('CAT') di bawah AP sebelum memohon untuk semakan

kehakiman. Dalam rayuan semasa terhadap keputusan Mahkamah Tinggi, perayu-perayu berhujah bahawa walaupun keputusan yang dicadangkan bukanlah keputusan muktamad di bawah s 40 AP, ia memerlukan mereka untuk mematuhi serta-merta dengan keputusan atau risiko dikenakan penalti kewangan selanjutnya. Perayu-perayu berkata bahawa memandangkan keputusan yang dicadangkan menjejaskan hak mereka, mereka sepatutnya dibenarkan untuk mencabar perkara yang sama melalui semakan kehakiman. Perayu-perayu berkata mereka tidak mempunyai alternatif selain mendapatkan semakan kehakiman kerana keputusan yang dicadangkan tidak boleh dirayu kepada CAT di bawah peruntukan AP.

Diputuskan, membenarkan rayuan, membenarkan perayu-perayu kebenaran dan menyerahkan semula perkara tersebut kepada Mahkamah Tinggi untuk mendengar hujah-hujah substantif:

(1) Kandungan keputusan yang dicadangkan menunjukkan bahawa responden telah membuat keputusan secara berkesan atas prinsip mengenai pelanggaran tersebut. Kesan jelas keputusan yang dicadangkan tersebut sendiri sememangnya keputusan pada dasarnya. Malah, dalam keputusan yang dicadangkannya, responden, antara lain, mengenakan penalti harian sebanyak RM15,000 dari tarikh keputusan yang dicadangkan tersebut disampaikan sekiranya perayu-perayu gagal mematuhi arahan responden. Sifat penentuan responden di bawah s 36 AP menunjukkan bahawa ia adalah satu langkah penting dalam laluan ke arah membuat keputusan di bawah s 40 AP. Walaupun keputusan muktamad di bawah s 40 AP tidak dibuat, ia tidak bermakna perayu-perayu dihalang daripada membuat cabaran pada peringkat awal ini. Tiada larangan automatik untuk dicabar pada peringkat ini (lihat perenggan 39 & 41–42).

(2) Certiorari tersedia untuk membatalkan kesan undang-undang atau akibat undang-undang keputusan yang disemak. Kandungan keputusan yang dicadangkan nampaknya mempunyai akibat undang-undang dan merupakan satu langkah dalam proses yang mampu menjejaskan hak, kepentingan atau liabiliti perayu (lihat perenggan 43–44 & 46).

(3) AP tidak memperuntukkan rayuan terhadap keputusan yang dibuat di bawah s 36(1). Oleh itu, Tribunal Rayuan Persaingan di bawah AP tidak mempunyai bidang kuasa untuk menangani aduan mengenai pengeluaran keputusan yang dicadangkan di bawah s 36(1). Hak untuk merayu di bawah AP hanya berkenaan dengan keputusan yang dibuat di bawah ss 35, 39 dan 40 AP. Oleh itu, Mahkamah Tinggi adalah salah kerana menolak kebenaran perayu atas dasar bahawa mereka mempunyai remedi alternatif yang sesuai untuk rayuan terhadap keputusan yang dicadangkan yang mereka belum gunakan (lihat perenggan 55–57).

(4) Terdapat persoalan undang-undang dan statut konstruktif yang

memerlukan pertimbangan lanjut pada peringkat substantif. Ia bukan untuk Mahkamah pada peringkat kebenaran untuk menentukan isu-isu tersebut. Mahkamah ini memutuskan untuk memberikan kebenaran kepada perayu kerana isu sama ada keputusan yang dicadangkan tersebut adalah 'keputusan' dalam pengertian A 53 k 2(4) KKM 2012 adalah isu yang boleh dipertikaikan (lihat perenggan 58 & 61).

(5) Mengenai fakta dan keadaan kes ini, hakim Mahkamah Tinggi mempunyai kuasa untuk mengarahkan permohonan kebenaran, yang biasanya dibuat secara ex parte pada peringkat pertama, didengar secara inter partes. Selagi hakim telah menunjukkan penggunaan budi bicara yang sewajarnya di bawah A 53 k 8(1) Kaedah-Kaedah Mahkamah 2012, berdasarkan fakta dan keadaan semasa dan prinsip kehakiman yang ditetapkan, mahkamah ini akan berhati-hati dalam memulakan campur tangan rayuan (lihat perenggan 27–28).]

Cases referred to

Advance Synergy Capital Sdn Bhd (formerly known as Advance Synergy Capital Bhd) v The Minister of Finance, Malaysia & Anor [2011] 6 MLJ 376; [2011] 7 CLJ 557, CA (refd)

Ainsworth v Criminal Justice Commission (1992) 106 ALR 11, HC (refd)

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185, SC (refd)

Hot Holdings Pty Ltd v Creasy and Others [1996] 134 ALR 469, HC (refd)

Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2019] MLJU 429; [2019] 7 CLJ 143, CA (refd)

Lee Kok Wai & Anor v Securities Commissions Malaysia [2015] 4 CLJ 260, HC (refd)

R v Secretary of State for the Home Department, ex p Rukshanda Begum [1990] COD 107, CA (refd)

Regina (Glencore Energy UK Ltd) v Revenue and Customs Commissioners [2017] 4 WLR 213, CA (refd)

Robin Tan Pang Heng (suing as Public Officer, Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2002] 1 MLJ 466; [2010] 9 CLJ 505, FC (refd)

Taylor's College Sdn Bhd v Ketua Pengarah Kesatuan Sekerja Malaysia & Ors [2009] 3 MLJ 437; [2009] 5 CLJ 153, CA (refd)

Tuan Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442; [1995] 3 CLJ 627, SC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016)

Competition Act 2010 ss 10(1), 14, 15, 18, 18(1), 35, 36, 36(1), (2)(c), 39, 40, 40(1), 42, 44, 51

Competition Commission Act 2010 s 3(1)

Rules of Court 2012 O 53 rr 2(4), 3, 3(2), 5, 8(1)

Appeal from: *MyTeksi Sdn Bhd & Ors v Suruhanjaya Persaingan* [2020] 11 MLJ 93 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (with Shanti Kandiah, Lim Yvonne, Khoo Suk Chyi & Nimraat Kaur) (Shanthi Kandiah Chambers) For the appellant.

Lim Chee Wee (with Kwan Will Sen & Muayyad bin Khairulmaini) (Lim Chee Wee Partnership) for the respondent.

Hanipah Farikullah JCA:

INTRODUCTION

[1] On 9 March 2020, the High Court refused an application by Myteksi Sdn Bhd, Grabcar Sdn Bhd, and Grab Inc ('the appellants') for leave to apply for judicial review against the proposed decision of The Competition Tribunal ('the putative respondent') dated 23 September 2019 made pursuant to s 36(1) of the Competition Act 2010 ('the Act') ('the proposed decision'). The appellant appeals against that refusal.

[2] The circumstances giving rise to this appeal appear in the judgment of the learned High Court judge. While reference to those circumstances is required in order to understand how the matter came before the High Court, the issue itself turns largely upon the proper principles of judicial review at the leave stage, which have been a frequent source of litigation. It complains in particular that the High Court hearing the leave application misconstrued and misapplied the law on judicial review.

THE PARTIES

[3] The parties are as follows:

(a) the first appellants is a company incorporated under the Companies Act 1965 that currently provides services commonly known amongst consumers as 'GrabTaxi' and GrabFood';

(b) the second appellant is a company incorporated under the Companies Act 1965 that currently provides services commonly known amongst consumers as 'GrabCar', 'GrabExpress', 'GrabAds', 'GrabShare' and 'GrabForBusiness'; and

(c) the third appellant is a company incorporated in the Cayman Islands. It is the sole shareholder of the first appellant and the majority shareholder of the second appellant. In the High Court, the third appellant reserved its position as to whether the proposed decision was validly issued against it.

[4] The putative respondent shall be referred to as the respondents for the purposes of this appeal. The respondents can briefly be described as follows:

(a) it is a body corporate established under s 3(1) of the Competition Commission Act 2010 ('the CCA'). It is the regulatory authority on all matters concerning competition law in Malaysia; and

(b) it carries out the function of, inter alia, implementing and enforcing the provisions of the Act.

THE BACKGROUND FACTS

[5] The facts maybe shortly summarised as follows.

[6] On or about 25 March 2018, the second appellant entered into an agreement with Uber Malaysia Sdn Bhd ('Uber') which provides among others, that Uber would transfer all its local assets and businesses to the second appellant.

[7] Thereafter, on 30 October 2018, upon complaints received, the respondent initiated an investigation on this matter including issuing notices requiring the first and/or second appellants to provide information and documents pursuant to s 18(1) of the Act.

[8] The respondent, inter alia, found that Grab had abused its dominant position by imposing a restrictive clause on its drivers which effectively prevented the drivers from promoting Grab's current and potential competitors in the e-hailing platforms and transit media advertising.

[9] On 3 October 2019, the respondent issued the proposed decision to each appellant pursuant to sub-s 36(1) of the Act.

[10] In the proposed decision, the respondent proposed to impose a financial penalty of RM86,772,943.76 on the appellants and failing which the appellants would be subjected to a daily penalty of RM15,000 from the date of service of the proposed decision.

[11] On 27 November 2019, the respondent received the appellants' notice of intention to make oral representations and on 30 December 2019, the respondent received the appellants' written representations pursuant to s 36(2)(c) of the CA.

[12] The main reliefs sought by the appellants were the following:

(a) that leave be granted pursuant to O 53 r 3 of the Rules of Court 2012 to

commence judicial review proceedings against the respondent for:

(i) an order of certiorari to enter the proposed decision into the High Court to be quashed forthwith;

(ii) an order of prohibition against the investigation under ss 14 and/or 15 and/or 18, and/or the issuance of a further proposed decision under s 36 of the Act by the respondent in respect of the same complaints which were investigated by the respondent and which culminated in the issuance of the proposed decision;

(iii) a declaration that the respondent's decision to impose a penalty retroactively prior to the determination of an infringement undersub-s 40(1) of the Act was ultra vires the Act and the CCA;

(iv) a declaration that the respondent was and is not empowered to publicise or otherwise communicate a proposed decision, the fact of any proposed decision made under s 36 of the Act, and/or the contents of the same or any part thereof, in any manner and/or to any parties other than as provided for under s 36 of the Act;

(v) a declaration that:
(1) the publication of the news release entitled 'MyCC PROPOSES TO FINE GRAB RM86 MILLION FOR ABUSIVE PRACTICES' by the respondent on its website at the following weblink https://www.mycc.gov.my/sites/default/files/pdf/newsroom/Proposed%20Decision%20against%20GRAB%20%Eng%29.pdf and/or at a press conference on 3 October 2019 was ultra vires the Act and the CCA; and/or
(2) the chief executive officer of the respondent had acted ultra vires the CA and the CAA in giving the interview or interviews that led to the publication of the article entitled 'Grab has till Dec 31 to submit written representations to MyCC' in *The Edge* for the week of November 18 to November 24, 2019;

(vi) an order for damages to be assessed and paid by the respondent to the first and second appellants pursuant to O 53 r 5 of the Rules of Court 2012 ('the ROC 2012') in respect of the costs incurred for the purposes of complying with the directives of the respondent as set out in para 256(ii) of the proposed decision; and

(vii) an order for damages to be assessed and paid by the respondent to the appellants pursuant to O 53 r 5 of the ROC 2012 in respect of the unauthorized publications stated in para 1.5 above, or any of them.

(b) in the event leave is granted to the applicants to apply for the reliefs above, an order that the execution or implementation of the proposed penalties

in the proposed decision dated 23 September 2019 be stayed and/or suspended until the final disposal of the judicial review.

THE PROPOSED DECISION

[13] The proposed decision was issued pursuant to s 36(1) of the Act.

[14] In principle, the proposed decision concluded that the appellants had abused their dominant position in the relevant market and had therefore infringed s 10(1) of the Act.

[15] The respondent communicated its proposed decision on 3 October 2019. It said to the appellants in the email amongst others as follows:

> From the statements and evidence obtained during the course of investigation, the Commission is satisfied that Grab's imposition of restrictions on drivers from promoting competitors and the prohibition against providing advertising services to the third-party enterprises had resulted in foreclosure effect to competitors in the relevant market. Accordingly, the Commission, on a balance of probabilities *concludes that Grab had abused its dominant position in the relevant market.* (Emphasis added.)

[16] Based on this, the respondent proposed to impose a financial penalty of RM86,772,943.76 on the appellants.

[17] The respondent also imposed a daily penalty of RM15,000 from the date of service of the proposed decision ('the proposed fine' in the event the appellants refuse or fail to comply with MyCC's directions). In this regard, the respondent had directed the appellants to undertake the following:

(a) to permanently remove the restrictive clause from Terms and Conditions, Supplement Terms of Use and Code of Conduct; and

(b) send notifications to all of its drivers in relation to the removal of the restrictive clause *via short messaging service for 12* consecutive weeks *commencing from the date of issuance of the proposed decision*. (Emphasis added.)

PUBLICATION OF THE PROPOSED DECISION

[18] Further to the above, on 3 October 2019, MyCC issued a news release entitled 'MyCC PROPOSES TO FINE GRAB RM86 MILLION FOR ABUSIVE PRACTICES' ('the news release') which announced as follows:

(a) the putative respondent had 'provisionally found that the second appellant, abused its dominant position by imposing a number of

restrictive clauses on its drivers which prevented the drivers from promoting and providing advertising services for the second appellant's competitors in the e-hailing and transit media advertising market; and

(b) the putative respondent intended 'to impose a financial penalty of RM86,772,943.76 against Grab as well as a daily penalty of RM15,000 per day from the date of service of the proposed decision should they fail to take remedial actions as directed by the putative respondent in addressing the competition concerns'.

[19] The news release was published on its website and at a press conference on 3 October 2019 ('the press conference'). The news release was widely circulated and publicized following the press conference.

THE DECISION OF THE HIGH COURT

[20] At the conclusion of the leave hearing, the learned High Court judge found that the proposed decision is not a final decision as it did not dispose of the rights of the parties and as such it is not amenable to judicial review. The learned High Court judge is of the view that it is not a final decision as the final decision is when the respondent decides whether there is infringement or otherwise. In support of his decision, the learned High Court judge relied on the following cases:

(a) *Taylor's College Sdn Bhd v Ketua Pengarah Kesatuan Sekerja Malaysia & Ors* [2009] 3 MLJ 437; [2009] 5 CLJ 153; and

(b) *Lee Kok Wai & Anor v Securities Commissions Malaysia* [2015] 4 CLJ 260

[21] The learned High Court judge also found that the appellants failed to exhaust internal remedies by filing an appeal to Competition Appeal Tribunal ('CAT') before commencing the judicial review application.

Whether a putative respondent can file an affidavit in opposition during leave stage

[22] At the commencement of the hearing before us, learned counsel for the appellants raised the issue of whether the learned High Court judge is empowered to turn the leave application into aninter partes hearing. It was pointed out that O 53 r 3(2) of the Rules of Court 2012 ('the ROC 2012') expressly states that applications for leave must be made ex parte.

[23] The evidence shows that after counsel for the appellant completed his oral arguments, the learned High Court judge invited counsel for the respondents to address the court.

[24] The guidelines to be followed by the court in considering an application for leave have been laid down in the case of *R v Secretary of State for the Home Department, ex p Rukshanda Begum* [1990] COD 107 and approved by the Supreme Court in the case of *Tuan Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442 at p 449; [1995] 3 CLJ 627 at p 633 wherein Edgar Joseph Jr SCJ in his judgment said:

> In *R v Secretary of State for the Home Department, ex p Rukshanda Begum* [1990] COD 107, *the Court of Appeal in England correctly laid down guidelines to be followed by the court when considering an application for leave, in the following terms:*
>
> (i) The judge should grant leave if it is clear that there is a point for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.
>
> (ii) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.
>
> (iii) If on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That inter partes leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing.
>
> The test to be applied by the judge at that inter partes leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator award, ... namely: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave.

[25] In *Advance Synergy Capital Sdn Bhd (formerly known as Advance Synergy Capital Bhd) v The Minister of Finance, Malaysia & Anor* [2011] 6 MLJ 376; [2011] 7 CLJ 557, a case cited by the appellants themselves, the Court of Appeal indeed acknowledged at para 21 that 'the putative respondent is not entitled as a matter of right to appear and demand to be heard', but it also recognised at the beginning of the said paragraph that:

> ... the judge may, at the ex parte leave stage, invite the putative respondent to attend and make representations as to whether or not leave should be granted. Such invitation is normally extended where, on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case: *R v Secretary of State for the Home Department, Ex Parte Rukshanda Begum [1990]* Crown Office Digest 109, DIP, CA (UK) per Lord Donaldson MR, as applied by the (then) Supreme Court in *Tuan Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442; [1995] 3 CLJ 627, *633 per Edgar Joseph JR FCJ (as he then was)*.

[26] The Court of Appeal further held at paras 25–26 that:

> ... There is *no plausible reason to exclude a proper party or person* to be granted leave

A to intervene as a respondent at the leave stage. In such circumstances, *inclusivity rather than exclusivity should be the norm, so as to ensure fairness to the party who has a direct interest in the matter* ...

[26] In addition, O 53 r 8(1) confers upon the judge *a wide discretion to hear a proper party or person in opposition to an 'application for judicial review' so long as the conditions contained therein have been fulfilled, viz:*

B

(1) the person desires to be heard in opposition to the application; and

(2) that person appears to the judge to be a proper person to be heard, notwithstanding that he has not been served with the cause papers in the matter.

C

[27] In this instant appeal, it is not disputed that the respondent in this case is the proper person to be heard. So long as the judge has demonstrated a proper exercise of discretion under O 53 r 8(1), on the basis of the facts and circumstances prevailing in each particular case, and established judicial principles, this court would be slow in embarking on an appellate interference.

D

[28] Based on the facts and circumstances of this case, we are of the view that the learned High Court judge does have powers to direct for the leave application which is usually made ex parte in the first instance, to be heard inter partes.

E

Whether a proposed decision under s 36 of the act is a decision in the context of judicial review

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[29] The discussion concerning whether the proposed decision is amenable to judicial review raised by the appellant, is an element of the central dispute submitted to the court. In this connection, we are of the view that the only issue which ultimately matters is the legal effect of the proposed decision. This issue must be considered in the context of the statute under which it was made.

G

[30] In gist, what is sought by the appellants is a certiorari to quash the proposed decision of the respondent. The appellant argued that certiorari is available because the proposed decision adversely affected the rights of the appellants as stated in the proposed decision. Learned counsel for the appellants submitted that the learned judge further failed to give due consideration to the fact that the proposed decision required immediate compliance by the appellants from the date of its issuance and had thereby caused immediate harm and/or injury to the appellants. This was more so for the fact that the respondent had taken the step of publicizing the proposed decision and the penalties it proposed to impose on the appellants despite not having any legal power to do so.

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[31] The respondent takes issue with the appellant on all those grounds and raises a threshold question of whether the application for judicial review is premature since the respondent has not yet taken a final decision which is amenable to judicial review.

[32] Learned counsel for the respondent submitted that the proposed decision issued under s 36 of the Act is not a final decision and therefore it is not a decision within the meaning of O 53 r 2(4) of the ROC 2012. In this court, this issue took up a considerable part of the arguments involving questions of law and facts.

[33] In support of the submissions that there was no decision amenable to judicial review, learned counsel for the respondent submitted that the respondent has not made a final decision under s 40 of the Act. The respondent relied on s 42 of the Act, which provides that only a direction given under s 35 of the Act or a decision under s 40 of the Act is amenable to judicial review.

[34] In the present case, the issue is whether a decision prior to the final exercise of a decision can be said to sufficiently affect legal rights. In this connection, the question is whether there is a decision which constitutes some condition precedent to the exercise of power which will affect legal rights.

[35] It is important to analyse the structure of the decision-making process prescribed by the Competition Act 2010, under which the proposed decision was made. The Competition Act creates various decision-making schemes before the respondent makes a final decision that entails there has been an infringement of the prohibition.

[36] The relevant provisions of the Competition Act are as follows:

> 36 proposed decision by the Commission
>
> (1) If, after the completion of the investigation, the Commission proposes to make a decision to the effect that one of the prohibitions under Part II has been or is being infringed, the Commission shall give written notice of its proposed decision to each enterprise that may be directly affected by the decision.
>
> (2) The notice shall —
>
> (a) set out the reasons for the Commission's proposed decision in sufficient detail to enable the enterprise to whom the notice is given to have a genuine and sufficient prospect of being able to comment on the proposed decision on an informed basis;
>
> (b) set out any penalties or remedial action that the Commission proposes to apply; and

(c) inform each enterprise to whom the notice is given that the enterprise may, within such reasonable period as may be specified in the notice —
(i) submit written representations to the Commission; and
(ii) indicate whether it wishes to make an oral representation before the Commission.

37 Oral representation

If an enterprise informs the Commission, within the period specified in the notice given under section 36 that it wishes to make an oral representation, the Commission shall, before taking any relevant decision —

(a) convene a session for the oral representation to be held at a date, time and place determined by the Commission; and

(b) give written notice of the date, time and place to —

(i) the enterprise concerned;

(ii) any person who had lodged a complaint with the Commission concerning the practice that was the subject of the Commission's investigation; and

(iii) any other person whose presence at the session of the oral representation is considered necessary by the Commission.

38 Conduct of hearings

(1) Notwithstanding section 37, the Commission may at any time conduct a hearing for the purpose of determining whether an enterprise has infringed or is infringing any prohibition under Part II.

(2) If the Commission determines that a hearing is to be held, it shall give at least fourteen days' notice in writing to the enterprise concerned and to other interested third parties —

(a) recording its decision to convene the hearing;

(b) specifying the date, time and place for the holding of the hearing; and

(c) stipulating the matters to be considered at the hearing.

(3) When the Commission decides to hold a hearing, it shall also decide-

(a) whether to hold individual hearings with each of the enterprises and any other interested third parties separately or to hold a single hearing attended by all the enterprises involved and the interested third parties; and

(b) whether to hold a hearing —
(i) in public; or
(ii) in a closed session, for the purpose of protecting confidential information.

(4) The hearing shall be governed by and conducted in accordance with the procedural rules for the time being in effect, as published by the Commission.

(5) The Commission shall keep a record of the hearing as is sufficient to set out the matters raised by any person participating in the hearing.

(6) An enterprise may be represented at a hearing by-

(a) any of its authorized officers or employees;

(b) any advocate and solicitor;

(c) any person falling within the description specified for that purpose in the Commission's procedural rules; or

(d) any other person, with the consent of the Chairman.

39 Finding of non-infringement

Where the Commission has made a decision that there is no infringement of a prohibition under Part II, the Commission shall, without delay, give notice of the decision to any person who is affected by the decision stating the facts on which the Commission bases the decision and the Commission's reason for making the decision.

40 Finding of an infringement

(1) If the Commission determines that there is an infringement of a prohibition under Part II, it —

(a) shall require that the infringement to be ceased immediately;

(b) may specify steps which are required to be taken by the infringing enterprise, which appear to the Commission to be appropriate for bringing the infringement to an end;

(c) may impose a financial penalty; or

(d) may give any other direction as it deems appropriate.

(2) The Commission shall, within fourteen days of its making a decision under this Part, notify any person affected by the decision.

(3) The Commission shall prepare and publish reasons for each decision it makes under this section.

(4) A financial penalty shall not exceed ten percent of the worldwide turnover of an enterprise over the period during which an infringement occurred.

[37] Our immediate task is to determine, against the backdrop of the respondent's proposed decision, whether leave should be granted or alternatively, if obviously not frivolous or vexatious, whether the application is legally hopeless such that we are satisfied that there is no case fit for further argument as a full inter partes hearing.

A **[38]** We begin by considering whether there is on the face of it an arguable case for leave to be granted.

[39] It seems that the content of the proposed decision shows that the respondent was effectively making a decision in principle on the infringement. We are of the view that the plain effect of the proposed decision itself, was indeed a decision in principle. In fact, in its proposed decision, the respondent, inter alia, imposed a daily penalty of RM15,000 from the date of service of the proposed decision in the event the appellants failed to comply with the respondent's directions. The nature of the respondent's determination under s 36 of the Act demonstrates that it was an important step on the path to a decision-making under s 40 of the Act.

[40] In our view, although part of the process remains to be gone through, there is already a decision that can be targeted.

[41] Plainly, there was no final decision under s 40 of the Competition Act. Under the provisions of s 40, the final decision will only arise when the respondent gives notice of the decision stating the facts on which the respondent based the decision and its reasons for making the proposed decision. The appellant could have waited until such a determination.

[42] However, it does not follow that the appellants are necessarily precluded from mounting a challenge at this earlier stage. There is no automatic bar to challenge at this stage. Therefore, it is necessary to consider at the substantive stage the reasons set out by the respondent for its proposed decision. It is also necessary to consider whether a useful purpose would be served by allowing that proposed decision under s 36 to be challenged in advance of a final decision if the court in its discretion considers that a useful purpose would be saved by such a challenge. Such challenges may be entertained in appropriate circumstances.

[43] Certiorari is available when a decision affects rights or where through a preliminary step, it is sufficiently connected with a decision that does so (see *Hot Holdings Pty Ltd v Creasy and Others* [1996] 134 ALR 469).

[44] The function of certiorari is to quash the legal effect or the legal consequences of the decision under review (see *Ainsworth v Criminal Justice Commission* (1992) 106 ALR). It follows that if an act or decision has no legal effect, there is nothing to quash.

[45] The majority in *Ainsworth* held at para 62:

> It is different when a report or recommendation operates as a precondition or as a bar to a course of action, or as a step in a process capable of altering rights, interests or liabilities. A report or recommendation of that kind may be quashed, that is to say its legal effect may be nullified by certiorari.

[46] The content of the proposed decision by the respondent appears to have legal consequences. It can be said that the proposed decision, in the context of the Competition Act, is a step in a process capable of affecting rights, interest or liabilities of the appellants. It must be stressed that the respondent had communicated to the appellants in its proposed decision:

> From the statements and evidence obtained during the course of investigation, the Commission is satisfied that Grab's imposition of restrictions on drivers from promoting competitors and the prohibition against providing advertising services to the third-party enterprises had resulted in foreclosure effect to competitors in the relevant market. Accordingly, the Commission, on a balance of probabilities *concludes that Grab had abused its dominant position in the relevant market*. (Emphasis added.)

[47] Whether a useful purpose is served by a challenge to the proposed decision depends on consideration at the substantive stage advanced by the parties. For that reason, the court should not have expressed any conclusion on it until it has considered the issues in this case at the substantive stage of the hearing. For that reason, we will not decide on the issue of prematurity in this appeal and we will not express our own conclusion on it.

[48] The particular question for decision at the substantive stage is whether certiorari lies to challenge the proposed decision by the respondent under s 36(1) of the Act.

SUITABLE ALTERNATIVE REMEDY

[49] Before the learned High Court judge and again before us, learned counsel for the appellant submitted that the court does not have the power to exercise review of a decision under s 36 of the Act as Competition Appeal Tribunal (CAT) is empowered by Parliament to hear appeals of the finding of infringement under ss 35, 39 and 40 of the Act.

[50] The principle that judicial review will be refused where a suitable alternative remedy is available is not in doubt. The Supreme Court in *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 clarified the law by stating that judicial review would not be granted where there is another remedy available to the applicants save only in very exceptional circumstances.

[51] Delivering the majority ruling succinctly, Hashim Yeop A Sani SCJ,

enunciated the law as follows:

> There is said to be a subsidiary rule to the effect that certiorari is not normally issued if the applicant has an alternative remedy available to him because the rationale is that he should first make use of the domestic remedy provided for him instead of invoking the writ jurisdiction.
>
> ...
>
> A clear principle is reiterated here i.e. it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.
>
> In *Re Preston* was a tax case. It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. But what was also made clear is that remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases.
>
> In answer to the first question we would therefore hold that the discretion is still with the courts but where there is an appeal provision available to the applicant certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.

[52] In *Robin Tan Pang Heng (suing as Public Officer, Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2002] 1 MLJ 466; [2010] 9 CLJ 505 the Federal Court observed that:

> [22] ... The appellant requested the High Court to invoke its residual powers and as succinctly stated by Sir John Donaldson MR in *R v Epping and Harlow General Commissioner* [1983] 3 All ER 257:
>
> > But it is a cardinal principle that, save in the most exceptional circumstances, that jurisdiction will not be exercised where other remedies were available and have not been used.

[53] In *Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2019] MLJU 429; [2019] 7 CLJ 143, this court stated that what amounts to exceptional circumstances depends on the facts of the case.

[54] Treating judicial review in ordinary circumstances as a remedy of last resort fulfils a number of objectives. It ensures the courts give priority to statutory procedures as laid down by Parliament, respecting Parliament's judgment about what procedures are appropriate for particular contexts. It avoids expensive duplication of the effort which may be required if two sets of procedures are followed in relation to the same underlying subject matter. It

minimises the potential for judicial review to be used to disrupt the smooth operation of statutory procedures which may be adequate to meet the justice of the case. It promotes proportionate allocation of judicial resources for dispute resolution and saves the High Court from undue pressure of work so that it remains available to provide speedy relief in other judicial review cases in fulfilment of its role as protector of the rule of law, where its intervention really is required (*Regina (Glencore Energy UK Ltd) v Revenue and Customs Commissioners* [2017] 4 WLR 213).

[55] In this present case, it is important to note that there is no provision for appeals against decisions made under s 36(1) of the Act (pursuant to which the proposed decisions were issued). It follows that CAT does not have jurisdiction to deal with complaints concerning the issuance of a proposed decision under s 36(1). As a creature of statute, the jurisdiction of CAT is necessarily circumscribed by the statute that provides for its existence. It is not open to CAT to assume jurisdiction when none is provided for under the Act.

[56] In our view, the appellant's interpretation is correct. The right of appeal to the Competition Appeal Tribunal ('CAT') under s 51 of the Act is not a suitable alternative remedy. It is observed that the right to appeal under the Competition Act is only concerned with decisions made under ss 35, 39 and 40 of the Act. This is evident from s 44 of the Act which provides:

> 44 Establishment of The Competition Appeal Tribunal
>
> There is established a Competition Appeal Tribunal, which shall have exclusive jurisdiction to review *any decision made by the Commission under* sections 35, 39 and 40.

[57] For the reasons given above, we consider that the learned High Court judge has erred to hold that there was a suitable alternative remedy in this case and to refuse to grant leave to apply for judicial review. On this issue, we conclude that the High Court should have exercised its discretion to grant leave for judicial review on the grounds that a suitable alternative remedy is not available against the proposed decision.

CONCLUSION

[58] Based on the above, in our view, there are questions of law and question of statutory construction to be considered further at the substantive stage. It is not for the court at the leave stage to determine these issues.

[59] In our view, the High Court has erred in the conclusion it reached and the appeal should be allowed. We remit the matter to the High Court for substantive arguments.

[60] We ordered the respondent to pay costs here and below of RM12,000 to the appellants subject to the allocator.

[61] In conclusion, we decided to give leave because the issue as to whether the proposed decision is a 'decision' within the meaning of O 53 r 2(4) of the ROC 2012 seemed to us to be arguable.

Order accordingly.

Reported by Ashok Kumar